

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 25, 2011

v

TIMOTHY JAMES ROACH,

Defendant-Appellant.

No. 294356
Calhoun Circuit Court
LC No. 09-1688-FC

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of armed robbery, MCL 750.529. Defendant was sentenced as a 4th-offense habitual offender to fifteen to thirty years' imprisonment, to be served consecutive to other sentences for which he was on parole. The only fact issue at trial was identification. We affirm.

Richard Daly was working the third shift at "Deb's One Stop," a gasoline station convenience store in the early morning. He observed a "tall gentleman with a black hooded sweatshirt with the hood up" enter the store—while other patrons were present—use the bathroom, buy a bottle of water, and leave. Approximately ten minutes later, when the other patrons had left, the man returned and demanded that Daly open the cash register. Daly refused until the man brandished a knife and started to come around the counter, at which point Daly gave the man all of the bills in the register. The man left, and Daly called both 9-1-1 and the store owner.

The police reviewed video footage¹ taken by the store's security system and showed still images taken from the video to various other law enforcement officers, including two corrections officers, defendant's probation officer, and defendant's parole officer. Seven people—all of whom were familiar with defendant for one reason or another—identified the person in the security footage as defendant. Daly was shown a photographic lineup that included a photograph of defendant. Daly was unable to make a positive identification from the line-up, although he

¹ This footage was played for the jury.

believed defendant's picture might have been the robber. When Daly first saw defendant in person at the preliminary examination, Daly was positive that defendant was the robber. When closely questioned about the possibility that Daly's recollection might have been suggested by the context, Daly explained that the robber had a unique profile that defendant matched. One of the police officers also explained that defendant's mother lived near Deb's One Stop.

Defendant first contends on appeal that the trial court erred in permitting several law enforcement officers to testify that they identified him from the security footage. Specifically, he argues that the law enforcement officers were not sufficiently familiar with him for their testimony to be more than minimally relevant, whereas the fact that they were all law enforcement officers was extremely prejudicial because the jury would necessarily infer that he was, in effect, a career criminal. We disagree.

The trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when a trial court chooses an outcome that falls outside the range of possible reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). There is no binding authority in Michigan specifically addressing the admissibility of lay witness opinion testimony identifying a defendant in a photograph. This Court has issued an unpublished opinion upholding a trial court's decision to permit a defendant's former employers to testify that the defendant was depicted in a similar surveillance video recorded during a convenience store robbery. *People v Gray*, unpublished opinion per curiam of the Court of Appeals, Docket No. 220815 (issued June 29, 2001).

Defendant argues that *Gray* is distinguishable because the defendant's employers in that case were much more familiar with the defendant than the law enforcement officers were with defendant in this case. We find this distinction irrelevant, because defendant effectively asks us to craft a new rule of evidence under which the trial court must first evaluate as a matter of law whether a given witness is "familiar enough" with a defendant before admitting that witness's testimony. Such a rule is unworkable. Any argument pertaining to whether a witness is familiar enough with a defendant to make a reliable identification from a photograph goes to weight, which defendant was able to argue adequately to the jury.² Otherwise, the witnesses' testimony about defendant's identity was admissible even though identification was the ultimate factual issue to be decided by the jury. See MRE 704.

Defendant's argument that the jury would draw an impermissible conclusion that defendant must be guilty because so many law enforcement officers were familiar with him is also unavailing. The trial court advised the jury in no uncertain terms not to make such an inference, and jurors are presumed to follow their instructions unless there is some indication that they cannot. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant's

² Defendant established that several of the officers were unaware whether defendant had any teeth missing.

citation to federal decisions expressing worry that jurors might abuse the knowledge of who the witnesses were shows why such a cautionary instruction is appropriate. However, defendant has not presented anything from which this Court could conclude that the jurors did not or could not follow that instruction.

Defendant next argues that the trial court abused its discretion by refusing to allow trial counsel to withdraw prior to trial. A trial court's decision whether to permit a defendant's appointed attorney to withdraw as counsel is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Appointment of substitute counsel is appropriate only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* We find no abuse of discretion.

Notwithstanding defendant's filing of a grievance against his attorney, there was nothing in the record to suggest that trial counsel failed to provide competent and zealous advocacy. We do not even find any indication that there was a serious difference of opinion about a fundamental trial tactic. Rather, defendant contends that trial counsel committed a major error by failing to require a physical line-up prior to the preliminary examination at which Daly first identified defendant. The trial court explained, correctly, that there was nothing that could be done to correct that alleged error now, no matter who defendant had for an attorney.

In a related argument, defendant claims that he received ineffective assistance of counsel. Defendant did not move for a new trial or for an evidentiary hearing, so this Court's review is limited to the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below an objectively reasonable standard and that if counsel had not erred there is a reasonable probability that the outcome would have been different. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). We find no showing of deficient performance.

Defendant's claim of ineffective assistance is based solely on trial counsel's failure to object to alleged instances of prosecutorial misconduct.³ Claims of prosecutorial misconduct are reviewed on a case-by-case basis and in the context of the entire proceedings. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutors are afforded latitude to argue the evidence and reasonable influences therefrom. *Unger, supra*, 278 Mich App at 236. The ultimate test is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). We find no prosecutorial misconduct.

Defendant argues that the prosecutor misrepresented to the jury, during closing argument, how many times Daly had identified him and how familiar the other witnesses were with him. The prosecutor emphasized that Daly had seen or identified defendant six times. It is unclear exactly how the prosecutor selected this number, but the evidence plausibly supports the conclusion that Daly saw defendant twice during two preliminary examination hearings, once at

³ As noted above, our review of the record does not reveal any suggestion that trial counsel was ineffective.

trial, twice on the day of the robbery, and once during the photographic lineup.⁴ The prosecutor initially implied that all of the officers had encountered defendant many tens of times, but on rebuttal clarified that they each had their own histories with defendant. We find nothing more than fair comments on the evidence. Because we find no misconduct, we also find that trial counsel could not have been ineffective for failing to object thereto.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause

⁴ Defendant contends that during trial, Daly selected a different photograph when shown the same array of photographs. We find the record unclear on this point.